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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EDWARD JERMAINE SAUNDERS, JR., Defendant and Appellant.	C049305 (Super. Ct. No. 04F02638)

A jury convicted defendant Edward Jermaine Saunders, Jr., of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[1] and found that he personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)). He was sentenced to state prison for 12 years.

On appeal, defendant contends (1) the evidence was insufficient because an uncorroborated eyewitness identification, standing alone, is not substantial evidence to support a criminal conviction; alternatively, even if identity

[1] Undesignated statutory references are to the Penal Code.

was proven, there was insufficient evidence of robbery; (2) the trial court erred by refusing to give his special instruction on factors related to eyewitness identification; and (3) his 12-year prison term constitutes cruel and unusual punishment. We shall affirm the judgment.

FACTUAL BACKGROUND

Prosecution case-in-chief

On March 15, 2004, a Sacramento County Sheriff's deputy responded to a report of a robbery. The deputy met with the 17-year-old victim, S.T., who said that two individuals confronted him in the parking lot of his apartment complex. The victim had gone to the parking lot in order to get a VCR out of his brother's car. The victim recognized defendant from junior high school. Defendant told the victim to give him the keys to the car. The victim refused. Defendant pulled up his shirt and showed the victim a gun. Defendant again said, "Give me your car keys. Don't make me shoot you." The victim again refused, stating, "No," and "I love that car." Defendant asked what else he had, and the victim responded that all he had was a VCR. Defendant took the VCR, told the victim not to tell anyone, and walked away.

Defense

The only defense witness was psychologist Bruce Behrman, who testified as to perception and eyewitness memory. The court recognized Dr. Behrman as an expert with respect to eyewitness identification. He testified that there is a generally accepted

theory of memory and perception, known as constructive memory. The theory identifies the perception, storage, and retrieval stages of memory. Dr. Behrman described a variety of factors that make eyewitness observation more or less reliable. He explained cross-racial identification and how the accuracy levels are lower when the perpetrator is a different race than the victim or witness.

DISCUSSION

I

Defendant contends that, "because it is inherently unreliable, uncorroborated eyewitness identification, standing alone, is not substantial evidence to support a criminal conviction." We are not persuaded.

Background

The 17-year-old victim was the only eyewitness to the crime. He was the first witness to testify at trial. On direct examination by the prosecutor, this exchange occurred:

"Q. And when you first saw [the suspects], did you recognize either of them?

"A. One of them.

"Q. Okay, and how did you recognize one of them?

"A. Went to junior high with him.

"[¶] . . . [¶]

"Q. And the one you recognized, when you recognized him, did you just recognize, Hey, I think I know that guy, or did a name come to your mind?

"A. A name came to my mind.

"Q. What name was that?

"A. Eddie.

"[¶] . . . [¶]

"Q. When you were in junior high with Eddie, how well would you say you knew each other?

"A. Well, we had PE together when I was in seventh grade.

"Q. Okay, and did you hang out in PE together?

"A. We were on the same football team a couple times and we, we never really hung out but, we . . . you know, in PE, we just kind of hung out, yeah.

"Q. Okay. And would you say you were friends with Eddie?

"A. Yeah, I guess we were friends.

"Q. Okay. And when Eddie approached you that night, what was he wearing?

"A. I remember a red shirt, a red headband and those teardrop glasses.

"[¶] . . . [¶]

"Q. And when Mr. Saunders spoke, did you recognize his voice at all?

“A. Yes, sir.

“Q. And how did you recognize the voice?

“A. Just came back to me just how he talked during junior high, never would change.”

When the prosecutor asked, “How did you come by the name Saunders to go with Eddie,” the victim replied, “I pulled out my seventh grade yearbook that I kept in my closet and opened it up and found him in my yearbook.”

Two nights after the robbery, the victim saw defendant at the apartment complex and called the police. The police took defendant into custody and asked the victim to identify a pair of sunglasses. The victim identified the sunglasses as the ones defendant wore on the night of the robbery.

The defense called Dr. Behrman to testify on the subject of eyewitness identification. On cross-examination by the prosecutor, this exchange occurred:

“Q. Now, Dr. Behrman, on direct examination, you mentioned that witness . . . identification is really a function of facial recognition, right?

“A. Yes.

“Q. And we’ve spoken a little bit about the fact that familiarity with somebody’s face vastly improves the ability to recognize and identify the face?

“A. I agree.

"Q. Okay. . . . Would you agree that in cases where you had additional information, that also improves identification; for example, if you were able to hear the person's voice, that would improve accuracy and the ability to recognize and identify?

"A. The problem . . . I would, I would think so. The hesitation I have is that I don't know of any experiments that really have put those together.

"Q. Okay.

"A. They usually investigated voice recognition separately from face recognition. But I, I would say the more cues you have, the better.

"Q. So if somebody sees a face and says, I recognize that face, and they hear that person's voice and say, I recognize that voice, that makes a later I.D. of somebody that they're already familiar with more reliable?

"A. Well, I would say it would. . . ."

Analysis

In *People v. Gould* (1960) 54 Cal.2d 621, the California Supreme Court held that a testifying witness's out-of-court identification "that cannot be confirmed by an identification [of the defendant] at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." (*Id.* at p. 631.)

However in *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*), the court unanimously overruled *Gould* and rejected its rule "that an out-of-court identification is by itself always insufficient evidence to support a conviction. Instead, the sufficiency of an out-of-court identification to support a conviction should be judged by the substantial evidence standard of *People v. Johnson* [(1980) 26 Cal.3d 557, 578]." (*Cuevas,* at p. 277.)

In this case, the victim identified defendant to the investigating officer *and* confirmed his identification at trial. Without citing or discussing *Cuevas*, defendant argues that this *confirmed* but uncorroborated identification is "inherently unreliable" and thus "not substantial evidence to support a criminal conviction." In defendant's view, "[u]ncorroborated eyewitness identification evidence is not 'substantial evidence.'"

Defendant effectively argues that, contrary to *Cuevas*, the victim's eyewitness identification *may not* "be judged by the substantial evidence standard of *People v. Johnson, supra,* 26 Cal.3d at page 578" (*Cuevas, supra,* 12 Cal.4th at p. 277) but *must* be found insufficient as a matter of law (*ibid.*). As an intermediate appellate court, we are bound to follow *Cuevas* and are not free to create a corroboration requirement that is even more stringent than the one formerly required by *Gould.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant contends that, even if eyewitness identification does not require corroboration, the circumstances of the present identification "w[ere] not substantial evidence of [defendant's] guilt." We disagree.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 (*Carpenter*), quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].)

In this case, the victim testified that he recognized defendant because they had gone to junior high school together and had been on the same football team. The victim also recognized defendant's voice: He testified that, during the confrontation, it "[j]ust came back to me just *how* he talked during junior high, *never would change*." (Italics added.)

Read in context, this description of "how [defendant] talked" refers to the tone, volume or other attribute of his speech, which "never would change" *while he was talking.* The victim did not claim that defendant's voice *had not changed* in

the years since he had heard it in junior high school. Defendant's argument that the victim had "said [defendant's] voice would 'never change,' a physical impossibility because [he] was nineteen at the time of the incident," misconstrues the record and has no merit.

Defendant's expert witness acknowledged that the accuracy of eyewitness identification is improved where, as here, the witness recognizes *both* a person's face *and* the person's voice. Because the victim may have seen, but evidently had not heard, defendant in the parking lot prior to the robbery, there is little indication that the voice identification was tainted by the pre-incident exposure that the expert had termed the "bystander effect." Nor was there any indication that the voice identification was less reliable because it was cross-racial. The expert testified that eyewitnesses are less capable of identifying perpetrators of races other than their own, but he did not suggest that this phenomenon applies to aural, as well as visual, cues to identification.

Defendant claims the evidence is not substantial because it "made no sense for [him] to rob someone he knew wearing distinctive sunglasses and return to the scene of the crime with the same glasses a day or two later. It also made no sense for him to approach the police holding those glasses." We disagree.

The jury impliedly found that defendant acted in a manner that made little objective sense. Such behavior is not unknown to the criminal law. Because the evidence reasonably justifies

the jury's finding, that this same evidence could also be reconciled with a contrary finding (the victim misidentified the defendant) does not warrant reversal of the judgment. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

Defendant claims the victim's inability to recall what the second suspect looked like draws into question his identification of defendant as well. We disagree. The jury could conclude that the victim was able to recall defendant, whom he knew, but he was unable to recall the other suspect, whom he did not know. The jury was not required to conclude that the victim had failed "to distinguish the individual characteristics of African-Americans."

Defendant claims that, even if the evidence of identity was substantial, his robbery conviction must be reduced to grand theft from the person (§ 487, subd. (c)) because there was insufficient evidence that he obtained possession of the VCR by force or fear. We disagree.

"In order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear. (See § 211.)" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 (*Cooper*).)

Defendant showed the victim his gun and said, "Give me your car keys. Don't make me shoot you." The victim refused, stating, "No" and "I love that car." Defendant then asked the victim what else he had, and the victim responded that all he had was a VCR. Defendant took the VCR from the victim.

The victim's refusal to surrender the car keys, and his willingness to surrender only the VCR, do not compel a finding that he had no fear of defendant. The record reveals no preexisting or alternate reason for the victim to give defendant anything. The jury could deduce that the victim surrendered the VCR only because he had seen the gun and was in fear of defendant. Defendant's robbery conviction is supported by substantial evidence. (*Carpenter, supra,* 15 Cal.4th at p. 387; *Cooper, supra,* 53 Cal.3d at p. 1165, fn. 8.)

II

Defendant contends the trial court erred by refusing his request to modify CALJIC No. 2.92--Factors to Consider in Proving Identity by Eyewitness Testimony, by adding the following sentence: "You must view eyewitness testimony with caution and evaluate it carefully."[2] We disagree.

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[2] CALJIC No. 2.92, as given by the trial court, told the jury:

"Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness'[s] identification of the defendant, including, but not limited to, any of the following:

"The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

"The stress, if any, to which the witness was subjected at the time of the observation;

"The witness'[s] ability, following the observation, to provide a description of the perpetrator of the act;

Defendant's request was based on *People v. Johnson* (1992) 3 Cal.4th 1183, 1230, fn. 12, in which the trial court modified CALJIC No. 2.92 to include the requested language as the second sentence. On appeal, the defendant raised five challenges to the modified instruction, but none involved the disputed language. Thus, this 1992 *Johnson* case had no occasion to hold, and did not hold, that the modification should be made in future cases. Defendant's claim that *Johnson* "approved" the language has no merit.

The 1992 *Johnson* court noted its earlier observation in *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*) that "CALJIC No. 2.92 normally provides sufficient guidance on the subject of eyewitness identification factors." (*People v. Johnson, supra,*

"The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

"The cross-racial or ethnic nature of the identification;

"The witness'[s] capacity to make an identification;

"Evidence relating to the witness'[s] ability to identify other alleged perpetrators of the criminal act;

"The period of time between the alleged criminal act and the witness'[s] identification;

"Whether the witness had prior contacts with the alleged perpetrator;

"The extent to which the witness is either certain or uncertain of the identification;

"Whether the witness'[s] identification is in fact the product of his own recollection;

"And any other evidence relating to the witness'[s] ability to make an identification."

3 Cal.4th at pp. 1230-1231, citing *Wright*, at p. 1141.) We conclude the present case is no exception.

Wright held that the trial court properly refused the following instruction: "'Where the prosecution has offered identification testimony, that is, the testimony of an eyewitness that he saw the defendant commit the act charged, such testimony should be received with caution. An identification by a stranger is not as trustworthy as an identification by an acquaintance. *Mistaken identification is not uncommon, and careful scrutiny of such testimony is especially important.*'" (*Wright, supra*, 45 Cal.3d at p. 1152, fn. 25, italics added.)

Defendant claims *Wright's* rejection of the foregoing instruction is not controlling because he did not request the italicized language. He claims *Wright* actually supports his entitlement to an instruction to "view eyewitness testimony with caution and evaluate it carefully," because such an instruction "'pinpoint[s] the theory of the defense.'" (*Wright, supra,* 45 Cal.3d at p. 1137.)

However, *Wright* also recognized that, "[i]n a proper instruction, '[w]hat is pinpointed is not specific evidence as such, but the *theory* of the defendant's case.'" (*Wright, supra*, 45 Cal.3d at p. 1137, quoting *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Defendant's *theory* was not merely that the testimony must be viewed with caution, but that it must be so viewed *for the reasons stated in CALJIC No. 2.92*. The

unmodified instruction given by the court properly set forth those reasons. As *Wright* recognized, "A special cautionary instruction is unnecessary because the 'factors' instruction . . . *properly highlights the factors relevant to defendant's concerns about the reliability of eyewitness identification testimony* in a particular set of circumstances." (*Wright, supra*, at p. 1153, italics added.) There was no instructional error.

III

Defendant contends his 12-year prison sentence is grossly disproportionate to his offense and violates the federal and state proscriptions of cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) We are not persuaded.

Defendant's 12-year sentence consists of the low term of two years for robbery (§§ 211, 212.5, subd. (c), 213, subd. (a)(2)) plus 10 years for personal firearm use (§ 12022.53, subd. (b)). The trial court denied his motion to reduce his sentence on the ground it was cruel and unusual punishment.

Section 12022.53, subdivision (a) lists a number of violent felonies, including robbery. (§ 12022.53, subd. (a)(4).) Subdivision (b) specifies that, "[n]otwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need

not be operable or loaded for this enhancement to apply." Subdivision (h) states that, "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Defendant's Eighth Amendment claim has no merit. He recognizes that the amendment allows a nonviolent first-time offender to be sentenced to state prison for life without the possibility of parole. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996-1001 [115 L.Ed.2d 836, 865-869].) Here, defendant committed a *violent* felony and received a determinate term of 12 years. (§ 667.5, subd. (c)(9).) Defendant's reliance on cases in which sentences of 25 years to life--imposed for *nonviolent third-strike offenses*--were found to violate the Eighth Amendment, is misplaced. (*People v. Carmo*ny (2005) 127 Cal.App.4th 1066, 1074-1089 [section 290 registration]; *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 756-757 [shoplift of VCR].)

In *People v. Felix* (2003) 108 Cal.App.4th 994 (*Felix*), the Court of Appeal reversed the trial court's finding that section 12022.53's mandatory 10-year enhancement was cruel or unusual punishment. (*Id.* at pp. 999-1002.) The court explained: "'[T]he punishment provided by law may . . . run afoul of the constitutional prohibition against cruel or unusual punishment in article I, section 17, of the California Constitution.' [Citation.] '[A] statutory punishment may violate the

constitutional prohibition not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed.' [Citation.] Because choosing the appropriate penalty is a legislative weighing function involving the seriousness of the crime and policy factors, the courts should not intervene unless the prescribed punishment is out of proportion to the crime. [Citation.] [¶] In deciding whether the punishment is cruel or unusual, the court must determine whether the punishment 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.] An examination of the nature of the offense and of the offender, '"with particular regard to the degree of danger both present to society"' is particularly relevant in determining this issue. [Citation.] In assessing the nature of the offense, a court should consider the circumstance of the particular offense such as the defendant's motive, the way the crime was committed, the extent of his involvement and the consequences of his acts. [Citation.] In analyzing the nature of the offender, a court should consider his 'age, prior criminality, personal characteristics, and state of mind.' [Citation.] '[A] punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability.' [Citation.] [¶] Reducing a sentence under [*People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*)] 'is a solemn power to be exercised sparingly only

when, as a matter of law, the Constitution forbids what the sentencing law compels.' [Citation.] The reduction of a sentence because it is cruel or unusual '"must be viewed as representing an exception rather than a general rule."' [Citations.] 'In such cases the punishment is reduced because the Constitution compels reduction, not because a trial court in its discretion believes the punishment too severe.' [Citation.] . . . [¶] [S]ection 12022.53, subdivision (b) does not require extreme violence. [Fn. omitted.] This statutory provision punishes the perpetrator of one of the specified crimes more severely for introducing a firearm into a situation which, by the nature of the crime, is already dangerous and increases the chances of violence and bodily injury. We conclude nothing in the nature of the offense or how it was committed allows striking the mandatory enhancement as cruel or unusual. [¶] . . . The lack of a criminal record is not determinative in a cruel or unusual punishment analysis." (*Felix*, at pp. 999-1001.)

We consider the offense and the offender. Every robbery is dangerous, in that the victim may resist or kill. (E.g., *People v. Briscoe* (2001) 92 Cal.App.4th 568, 583.) Here, defendant and an accomplice committed an armed robbery of a 16-year-old victim in the parking lot of his apartment complex. Defendant displayed a gun, twice threatened to shoot the victim, and physically took the VCR from him. The fact the robbery netted only a VCR of minimal value, for which the victim never sought

restitution, does not lessen the severity of the offense. We have already rejected defendant's argument that his actions "engendered no fear in" the victim. (See part II, *ante*.)

Defendant was three months shy of his 19th birthday and had no documented criminal history. However, he possessed a gun and was wearing a red shirt, a red headband, and teardrop sunglasses. He was not passive in his commission of the robbery, he was not exceptionally immature, and he did not act from panic or fear. (Cf. *Dillon, supra,* 34 Cal.3d at pp. 482, 483, 486, 488.) Because defendant and his offense posed a significant degree of danger to society, the 10-year enhancement is not disproportionate to his individual culpability. (*Felix, supra,* 108 Cal.App.4th at pp. 999-1001.)

Defendant claims his 12-year sentence is excessive when compared with the maximum terms for more serious offenses: gross vehicular manslaughter while intoxicated--10 years (§ 191.5, subd. (c)); voluntary manslaughter--11 years (§ 193, subd. (a)); mayhem--eight years (§ 204); kidnapping--eight years (§ 208, subd. (a)); and carjacking--nine years (§ 215, subd. (b)). However, defendant's robbery was proportionately punished by the less severe low-term sentence of two years. (§ 213, subd. (a)(2).) His use of a firearm, which greatly enhanced the risk of death, brought his sentence within the vicinity of crimes actually causing death (voluntary or vehicular manslaughter) or posing great risk of death (carjacking, kidnapping, mayhem). No disproportionality is shown.

Defendant claims his sentence is excessive when compared to the gun use penalties in other states. He concedes that two states (Arkansas and Idaho) impose longer enhancements, but he notes that neither state precludes probation or precludes the trial court from striking the enhancement in the interest of justice. (§ 12022.53, subds. (g), (h); see Ark. Code Ann., § 16-90-120, subd. (a); Idaho Code, § 19-2520.) Thus, as applied, California's enhancement scheme may be the most severe in the nation.

"That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against . . . any . . . type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.